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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

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## **Memorandum of Points and Authorities**

## **Introduction**

Plaintiffs LORETO G. CEREZO and NIDA F. CEREZO (“Plaintiffs”) herein submit their OPPOSITION TO WELLS FARGO’S NOTICE OF MOTION AND MOTION TO DISMISS COMPLAINT FOR FAILURE TO STATE A CLAIM for failure to state a claim.

## **Factual Background**

Plaintiffs LORETO G. CEREZO and NIDA F. CEREZO (“Plaintiffs”) are allegedly the Borrowers on that certain Deed of Trust recorded on January 19, 2006 as Instrument No. 18773046 in the Official Records of the Recorder of Santa Clara County, California, purportedly putting a lien on the real property located at 3125 Woods Way, San Jose, CA 95148, (the “Subject Property”).

On January 19, 2006, Plaintiffs recorded a Deed of Trust in the Santa Clara County Recorder's Office against the Subject Property to secure a Promissory Note in the amount of \$628,000 in favor of World Savings Bank, FSB, ("World Savings") as "Lender." The Deed of Trust names Golden Savings Assoc. Service Co. ("Golden") as Trustee.

Subsequently, as was its usual practice, World Savings securitized and sold the beneficial interest in Plaintiffs' Deed of Trust to a Mortgage Backed Securities Trust,

Later in 2006 or 2007, as was its customary business practice, World Savings assets were acquired by Wachovia which securitized and sold Plaintiffs' Deed of Trust to a real-estate-mortgage-investment-conduit ("REMIC") trust, the Wachovia Mortgage Loan Trust, Series 2006-ALT1 Trust, ("Series 2006 ALT1 Trust" or "the Trust"). After this sale, Wachovia retained solely the servicing rights to Plaintiffs' loan. Well Fargo then acquired Wachovia and claims a right to foreclose on Plaintiffs' property.

On December 7, 2012, a Notice of Default and Election to Sell Under Deed of Trust (“NOD”) was recorded in the Santa Clara County Recorder’s Office. The Notice of Default was

1 signed illegally by Meriel Lee, purportedly as employee of NDEX, as agent for the Beneficiary,  
 2 Wells Fargo.

3 On or about January 2, 2013, a Substitution of Trustee under Plaintiffs' Deed of Trust  
 4 was executed. Through this document, Wells Fargo, purported to make a substitution of Trustee  
 5 in favor of NDEX.

6 Thereafter, a Notice of Trustee's Sale was recorded in the Santa Clara County Recorder's  
 7 Office, signaling the final stage in the process of foreclosing upon the Subject Property. A  
 8 Trustee's Sale is currently scheduled for March 16, 2013.

9 **Law and Argument**

10 **I. Legal Standard**

11 A Rule 12(b)(6) Motion to Dismiss tests only whether the Plaintiff's Complaint states  
 12 sufficient facts to state a plausible claim for relief. *Bell Atlantic Corp. v. Twombly*, 550 U.S.  
 13 544, 557 (2007). A complaint which contains sufficient factual allegations "to raise a right to  
 14 relief above the speculative level" will survive a motion to dismiss. *Id.* A complaint must state a  
 15 claim that is facially plausible, requiring facts showing more than a sheer possibility that a  
 16 defendant has acted unlawfully." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). "A claim has  
 17 facial plausibility when the plaintiff pleads factual content that allows the court to draw the  
 18 reasonable inference that the defendant is liable for the misconduct alleged." *Id.* In evaluating  
 19 whether a complaint meets this standard, the court is not required to take the plaintiff's legal  
 20 conclusions as true, but must take the plaintiff's factual allegations as true, and then "determine  
 21 whether they plausibly give rise to an entitlement to relief." *Id.* at 1950.

22 **II. Plaintiff's Claims Are Not Preempted by the Home Owner's Loan Act**

23 Defendant claims that the Home Owners' Loan Act of 1933, 12 U.S.C. § 1461, et seq.  
 24 ("HOLA"), preempts the California non-judicial foreclosure statutory scheme, California Civil  
 25 Code Section 2924, et seq. See 12 C.F.R. § 560.2(b)(10) (listing state laws relating to  
 26

1 “[p]rocessing, origination, servicing, sale or purchase of, or investment or participation in,  
 2 mortgages” as among those preempted.).

3 As a national bank, the actions of Wells Fargo are not subject to preemption by the Home  
 4 Owners’ Loan Act (“HOLA”), 12 U.S.C. § 1451, et seq., which provides authority for the  
 5 creation and regulation of federal savings associations, the establishment of the OTS, and also  
 6 invests power in the Director of the OTS to carry out the responsibilities of the Director of the  
 7 office. 12 U.S.C. § 1462a(b)(2). Instead, the actions of Wells Fargo are regulated under the  
 8 National Bank Act (“NBA”), 12 U.S.C. § 38, et seq. which is structured differently from HOLA  
 9 and provides a basis only for “conflict” preemption of state law. Because California Civil Code  
 10 § 2923.5 addresses the foreclosure process and ownership interest rather the loan processing,  
 11 there is no federal foreclosure law that would pose a conflict and therefore, no preemption of  
 12 state law under the NBA or HOLA.

13 However, Defendant ignores the difference between laws governing the origination of a  
 14 loan or processing of its payments and state laws governing the transfer and disposition of real  
 15 property. See 12 C.F.R. § 560.2(c)(2) (listing real property law as among those state laws not  
 16 preempted); see also *Mabry v. Superior Court*, 185 Cal. App. 4th 208, 230 (2010) (noting that  
 17 “the process of foreclosure has traditionally been a matter of state real property law” and going  
 18 on to conclude that HOLA does not preempt claims under California Civil Code Section 2923.5  
 19 governing borrower contact requirements prior to the Notice of Default.) (*Emphasis in the*  
 20 *original*).

21 The *Mabry* court found that the “processing” and “servicing” of mortgages does not  
 22 include the steps required to complete a non-judicial foreclosure, noting that the regulation of  
 23 foreclosures is an area uniquely within the realm of state law. *Id.* at 230-31. Similarly, this  
 24 Court should conclude that, contrary to Defendant’s contentions, the exclusive federal regulation  
 25 of “processing” and “servicing” of mortgages under HOLA does not extend beyond mortgage  
 26 servicing to also include preemptive regulation of real property transfers via non-judicial  
 foreclosures, an area traditionally within the confines of state law as “real property law”.

1 Further, to the extent that Defendant's preemption argument is based on Plaintiffs' challenge to  
 2 the fact of securitization itself, any preemption should not also apply to Plaintiffs' challenge that  
 3 the actions by Wells Fargo Bank to complete the foreclosure were wrongful because those  
 4 actions did not arise out of the origination or servicing of the loan but instead stemmed from  
 5 Wells Fargo's efforts to wrongfully foreclose upon the Deed of Trust.

6

7 **III. Plaintiff Stated Sufficient Facts for Breach of Contract(s) or Implied  
 Agreement(s)**

8 Any foreclosure of Plaintiffs' home and Defendants' assertion of rights to the beneficial  
 9 interest and powers of trustee in recorded documents and cloud on Plaintiffs' title is wrongful  
 10 because Defendants were and are not currently the true Beneficiary or Trustee under Plaintiffs'  
 11 Deed of Trust and thus lack the power of sale and to record documents with legal effect as to  
 12 Plaintiffs' Property and conducted an illegal foreclosure sale.

13 Plaintiffs facing non-judicial foreclosure can assert "a specific factual basis for alleging that  
 14 the foreclosure was not initiated by the correct party." *Gomes v Countrywide Home Loans*, 192  
 15 Cal. App. 4th 1149, 1156 (2011). That is, a plaintiff may bring a suit alleging that the entity that  
 16 initiated the foreclosure lacked the power to foreclose and therefore had no legal authority to  
 17 foreclose upon the property. Several courts have allowed plaintiffs' claims to proceed where the  
 18 plaintiff asserted that the entity which initiated the foreclosure lacked the right to foreclose. See  
 19 *Tamburri v. Suntrust Mortgage, Inc.*, 2011 WL 6294472 at \*10-11 (N.D. Cal. 2011) (citing  
 20 *Sacchi v. Mortgage Electronic Registration Systems, Inc.*, 2011 WL 2533029, \*8 (C.D. Cal.  
 21 2011)) (holding that there is a valid cause of action where there are "facts suggesting the  
 22 foreclosing party had no legal interest in the deed at the appropriate time"). Thus, contrary to  
 23 Defendants' contention Plaintiffs may challenge the validity of the Notice of Default ("NOD"),  
 24 Substitution, and Notice of Trustee's Sale ("NOTS") and whether Defendants had the legal  
 25 power to foreclose.

1       Wells Fargo was never transferred the beneficial interest in Plaintiffs' Deed of Trust because  
 2 Wachovia lacked the power of sale and , the merger or purchase of assets was ambiguous with  
 3 respect to acceding to rights to Plaintiffs' mortgage and DOT, as well as the right to transferring  
 4 same. There was no Assignment of Deed of Trust. The foreclosure documents including the  
 5 NOD, Substitution of Trustee, and Notice of Trustee's Sale cloud Plaintiff's title because Wells  
 6 Fargo, U.S. Bank and NDEX had no authority to record an NOD as of December 7, 2012 due to  
 7 the fact that the Substitution of Trustee in favor of NDEX was not recorded until January 29,  
 8 2013, and was invalid because it was signed by an employee of Wells Fargo which had no legal  
 9 relationship and was a stranger to Plaintiffs' DOT and mortgage.

10      Since the NOD is invalid and there was no assignment, Defendants had no ownership interest  
 11 to enforce, and any foreclosure actions taken on behalf of U.S. Bank, Wells Fargo, NDEX or any  
 12 other entity are wrongful and in violation of the California Civil Code.

13      The NOD is false and in violation of the terms of Plaintiff's DOT. The foreclosure violates  
 14 Plaintiff's DOT which required the Trustee to record the NOD and in this case the NOD was  
 15 recorded by a third-party without any legal claim to be trustee and which was not the true trustee  
 16 under the DOT.

17      Here, a foreclosure and sale of the Subject Property allegedly pursuant to the power of sale  
 18 under Plaintiffs' Deed of Trust is oppressive and illegal because the NOD was recorded by  
 19 NDEX who is not the true Trustee. The original Trustee under the Deed of Trust was Golden  
 20 West Savings Association Service Company ("Golden West"). NDEX claims to be the proper  
 21 Trustee despite the fact that a Substitution of Trustee in favor of NDEX was not recorded by the  
 22 original Lender before the chain of title was broken and was recorded by Wells Fargo on January  
 23 29, 2013, after NDEX recorded the NOD on December 7, 2012; therefore NDEX had no agency  
 24 to record any documents as of December 7, 2012 or thereafter due to the lack of certainty in the  
 25 purchase agreements between World Savings, Wachovia and Wells Fargo and with respect to  
 26 Plaintiffs' mortgage and DOT. Neither U.S. Bank or Wells Fargo could not have been the legal  
 beneficiary at that point, nor at all, because the servicing rights to Plaintiffs' loan were also

1 muddied due to the imperfect securitization and failure to specifically identify Plaintiffs' Note  
 2 and DOT in the bank merger and purchase transactions.

3 Here, there was never any valid Substitution of Trustee because Wells Fargo was not the  
 4 Lender and there was no proper conveyance of the property or mortgage because there was no  
 5 assignment.

6 The recording of these documents cast doubt on Plaintiffs' title. Plaintiffs have suffered a  
 7 direct financial loss as a result of the recordation of these false documents because they were  
 8 forced to seek legal counsel to protect their interest in the Subject Property and from having their  
 9 home wrongfully sold.

10 These documents caused economic damages to Plaintiffs because they disclose a claim of  
 11 right, title or interest in the subject property which gives rise to a need for policy endorsements  
 12 for title insurance, settlement of a claim shown on a title report, and/or a significant dissuasive  
 13 factor for any prospective purchaser inspecting the property for sale, and/or its disclosures, any  
 14 and all of which factors negatively affected and continue to affect the purchase price of the  
 15 Subject Property, and vendibility, of the Subject Property in an amount to be proven at trial.

16 The recording of the aforementioned documents made if necessary for Plaintiffs to retain  
 17 attorneys and to bring this action to cancel the instruments casting doubt on Plaintiffs' title.

18 The Court of Appeal has held that at least in cases such as this one where title was disparaged  
 19 in a recorded instrument, attorney fees and costs necessary to clear title or remove the doubt case  
 20 on it by defendant's falsehoods are, by themselves, sufficient pecuniary damages for purposes of  
 21 a cause of action for slander of title. *Sumner Hill Homeowners' Assn., Inc. v. Rio Mesa Holdings,*  
 22 *LLC* (2012) 205 Cal.App.4th 999.

23 The Court also noted that courts in other jurisdictions have directly confronted this issue and  
 24 have concluded that attorney fees incurred in removing the effects of slander of title are  
 25 recoverable as special damages even in the absence of proof of an impairment of vendibility.

1       In this matter, Plaintiffs assert a claim of breach of contract on the basis of the totality of  
 2 allegations in the Complaint including facts alleged and pertaining to the false Deed of Trust,  
 3 and foreclosure documents which constitute violations of the California Civil Code.

4       Furthermore, even if Plaintiff's claims were based solely on the grounds that a PAA fails to  
 5 transfer the right to foreclose, at least one federal court of jurisdiction has found this argument to  
 6 be persuasive. In an 11-page Order dated June 2, 2011, the United States District Court for the  
 7 Central District of California has denied JPMorgan Chase Bank's Motions to dismiss a  
 8 borrower's claims for violations of CA Civ. Code 2923.5, Wrongful Foreclosure, Quiet Title,  
 9 Quasi Contract, Declaratory Relief, and Injunctive Relief in the matter of *Javaheri v. JPMorgan*  
 10 *Chase Bank*, Case No. CV10-08185 ODW. The decision cites case law from the United States  
 11 Supreme Court, the United States Court of Appeals for the 9th Circuit, and California state  
 12 courts.

13       The borrower in the *Javaheri* case filed a Second Amended Complaint for numerous causes  
 14 of action including those identified above. The loan had been originated by Washington Mutual  
 15 Bank (WaMu), with the loan thereafter being securitized. JPM relied upon the Purchase and  
 16 Assumption Agreement between JPM and the FDIC as Receiver for WaMu, contending that it  
 17 had succeeded to all of WaMu's assets, including the borrower's note.

18       The borrower in *Javaheri* claimed that between November 13 and 30, 2007, WaMu  
 19 transferred his Note to Washington Mutual Mortgage Securities Corporation and that the Note  
 20 was sold to an investment trust and became part of a loan pool, PSA, CDO, mortgage-backed  
 21 security or pass-through certificate, credit default swap, investment trust, and/or a special  
 22 purpose vehicle. The loan was identified with a CUSIP number and the pool number. The court  
 23 found that "Coupled with Plaintiff's allegation that JPMorgan never properly recorded its claim  
 24 of ownership in the subject property, the above mentioned facts regarding the transfer of  
 25 Plaintiff's Note prior to JPMorgan's acquisition of WaMu's assets raise Plaintiff's right to relief  
 26 above a speculative level", warranting denial of JPM's Motions to Dismiss as to the claims set  
 forth above.

1 One of the more interesting theories raised by *Javaheri* was the “Quasi Contract” claim,  
 2 where the borrower alleged that JPM was unjustly enriched by any payments made by the  
 3 borrower to JPM which were not paid to the lender or beneficiary. The Court concluded, for  
 4 purposes of pleading, that “if indeed JPMorgan did not own the Note yet received payments  
 5 therefrom, those payments may have been received unjustly”. We believe that if in fact JPM  
 6 fraudulently represented to the borrower that it did own or have rights to collect monies under  
 7 the Note when in fact it did not, this would support a fraud-based claim as well.

8 The Court specifically found that “in the face of these specific factual allegations (by the  
 9 borrower as to the securitization of the loan) JPMorgan’s assertion that the P&A Agreement  
 10 suffices to establish their ownership of the Note is no longer viable. Indeed, the P&A Agreement  
 11 does not specifically identify Plaintiff’s Note.”

12 In the instant matter, Plaintiff was prejudiced by Defendants’ assertion of the right to  
 13 foreclose and maintaining the false Deed of Trust recorded against Plaintiff’s property because  
 14 the false Deed of Trust is the foundation for Defendants’ attempts to complete a wrongful  
 15 foreclosure of Plaintiffs’ property and the foreclosure documents could simply be re-recorded  
 16 should Plaintiffs’ lawsuit be dismissed. Without the improper and false Deed of Trust, these  
 17 Defendants would not have initiated this foreclosure. As the Court stated in *Tamburri*, 2011 WL  
 18 6294472 at \*14, the fact that the wrong party initiated a foreclosure demonstrates prejudice to the  
 19 Plaintiff:

20 California law requires strict compliance with non-judicial foreclosure statutes. *Ung v.*  
 21 *Koehler*, 135 Cal.App.4th 186, at 202–03, 37 Cal.Rptr.3d 311 (2005) (“The statutory  
 22 requirements must be strictly complied with, and a trustee’s sale based on statutorily deficient  
 23 notice of default is invalid.”). California courts have acknowledged that notices of default serve a  
 24 vital purpose as the “crucial first step in the foreclosure process.” *Mabry v. Superior Court*, 185  
 25 Cal.App.4th 208, 221, 110 Cal.Rptr.3d 201 (2010). Thus, assuming prejudice is required, the  
 26 threat of foreclosure by the wrong party would certainly be sufficient to constitute prejudice to

1 the homeowner because there is no power of sale without a valid notice of default. *Castillo v.*  
 2 *Skoba*, 2010 WL 3986953 at\*2.

3 Plaintiffs' Deed of Trust limits appointment of successor trustees to the powers of the Lender  
 4 and names the Lender in this case as World Savings. The Substitution of Trustee recorded on  
 5 January 29, 2013 is invalid by the terms of Plaintiffs' Deed of Trust.

6 Here, there was never any valid Substitution of Trustee because Wells Fargo substituted  
 7 NDEX in as Trustee, when Wells Fargo had no legal claim to the Lender or beneficial interest  
 8 holder as there had been no legal conveyance to Wells Fargo recorded in the public record as of  
 9 the time of recording the Substitution of Trustee.

10 The Substitution of Trustee in favor of NDEX is invalid for the aforementioned reasons,  
 11 therefore, in recording the foreclosure documents including the December 7, 2012 NOD and the  
 12 Notice of Trustee's Sale, NDEX and Wells Fargo and U.S. Bank attempted a wrongful  
 13 foreclosure in violation of the above-referenced provisions of Plaintiffs' Deed of Trust.

14

15 **IV. Plaintiff Stated a Cause of Action for Lack of Standing and Wrongful  
 Foreclosure**

16 Plaintiffs alleged that the foreclosure process, was mishandled and therefore prevents  
 17 Defendants from enforcing Plaintiffs' Deed of Trust because it is too late to correct these defects  
 18 including violations of the California Civil Code, robo-signing, and violations of the terms of  
 19 Plaintiffs' Deed of Trust.

20 Defendant U.S. Bank and Wells Fargo claim that Plaintiffs lack standing to challenge the  
 21 foreclosure of their home and to seek injunctive relief because they have failed to tender the full  
 22 amount due under the note. Without Plaintiffs making such an offer or payment, Defendants  
 23 argue that the tender rule acts as a complete bar against all of Plaintiffs' causes of action, and  
 24 thus all their claims should be dismissed. However, the requirement that a borrower seeking to  
 25 set aside a foreclosure sale must first tender the full amount of the debt is not an absolute rule. In  
 26

1 the instant case, Plaintiffs are not precluded from pursuing their causes of action for failing to  
 2 tender because it would be inequitable to require tender.

3 A cause of action to enjoin or set aside a trustee's sale is an action in equity. Miller & Starr  
 4 California Real Estate 3d 10:212; *Tamburri v. Suntrust Mortgage, Inc.* (N.D. Cal. 2011) 2011  
 5 WL 6294472, \*3. As courts have recognized, a rigid tender rule would often entirely preclude  
 6 homeowners from challenging wrongful foreclosures. *Sacchi v. Mortgage Electronic*  
 7 *Registration Systems, Inc.* (C.D. Cal. 2011) 2011 WL 2533029, \*9. Like the Plaintiffs here,  
 8 most homeowners do not have the funds necessary to pay off the entire balance of their loans at  
 9 one time. If the tender rule was without exception, homeowners in danger of losing their home  
 10 through, "error or malfeasance . . . would be unable to hold on to this most precious possession  
 11 [home]. This would be a grossly inequitable result and would permit entities to foreclose on  
 12 properties without impunity." *Sacchi*, 2011 WL 2533029 at \*9.

13 To avoid this result, and contrary to what Defendant argues, California courts have  
 14 recognized that an offer of "tender may not be required where it would be inequitable to do so."  
 15 *Onofrio v. Rice* (1997) 55 Cal. App. 4th 413, 424 (affirming trial court's grant of relief to  
 16 plaintiff on rescission claim although plaintiff failed to tender). See also *Lona v. Citibank, N.A.*  
 17 (2011) 202 Cal. App. 4th 89, 113 ("a tender may not be required where it would be inequitable to  
 18 impose such a condition on the party challenging the sale"); *Sacchi*, 2011 WL 2533029 at \*10;  
 19 *Tamburri*, 2011 WL 6294472 at \*3; *Humboldt Sav. Bank v. McCleverty* (1911) 161 Cal. 285,  
 20 291 (recognizing "cases holding that, where a party has the right to avoid a sale, he is not bound  
 21 to tender any payment in redemption" adding that, "[w]hatever may be the correct rule, viewing  
 22 the question generally, it is certainly not the law that an offer to pay the debt must be made,  
 23 where it would be inequitable to exact such offer of the party complaining of the sale").

24 In the instant case, as in *Lona*, *Sacchi* and *Tamburri*, Plaintiffs should not be required to  
 25 make a full tender offer because they are challenging that Defendants lacked the legal power to  
 26 foreclose and requiring tender under these circumstances would be inequitable. Where, as here,  
 the foreclosure initiated by Defendants is void due to the fact that the December 7, 2012 Notice

1 of Default and Election to Sell (“NOD”) was signed by NDEX, not the true Trustee due to the  
 2 intervening transfers to Wachovia and Wells Fargo and break in the chain of title. Because the  
 3 NOD was signed by someone without authority and is thus false, it renders any subsequent  
 4 foreclosure proceedings invalid.

5 Moreover, the December 7, 2012, NOD is invalid because NDEX executed the NOD,  
 6 purportedly as Trustee, but NDEX was not in fact the Trustee under Plaintiffs’ Deed of Trust on  
 7 that date. The Substitution of Trustee was recorded on January 29, 2013, after the NOD was  
 8 recorded. Therefore, NDEX had no authority to record the NOD as of December 7, 2012  
 9 rendering the NOD void and without any legal force or effect.

10 Plaintiffs are not required to tender the amount due to challenge this void foreclosure sale.  
 11 *Tamburri*, 2011 WL 6294472 at \*4 (“where a sale is void, rather than simply voidable, tender is  
 12 not required”). As the Court found in *Dimock*, a Trustee’s Deed issued by an entity who was not  
 13 the correct Trustee is void. 81 Cal. App. 4th at 876; see also *Lona*, 202 Cal. App. 4th at 113.

14 The December 7, 2012 NOD is also false and invalid due to Defendants’ failure to comply  
 15 with the Notice and Contact requirements of California Civil Code Section 2923.5 which renders  
 16 the NOD, false, and all subsequent proceedings based on said Notice, invalid and void, including  
 17 the Trustee’s Deed Upon Sale. See *Mabry v. Superior Court*, 185 Cal. App. 4th 208, 236-37  
 18 (2010) (Notice of Default which fails to comply with Section 2923.5 is invalid and a non-judicial  
 19 foreclosure may only proceed if a new, valid Notice of Default is recorded). The statement in  
 20 the NOD recorded on December 7, 2012 of compliance with Section 2923.5 is false because  
 21 Defendants U.S. Bank, Wells Fargo, and NDEX violated Section 2923.5 by failing to contact  
 22 Plaintiffs, in person or by telephone, at least 30 days prior to recording the NOD on December 7,  
 23 2012 and/or recording a declaration attesting to compliance by a person with personal knowledge  
 24 of these facts. There is no statement in the NOD recorded December 7, 2012 stating with  
 25 personal knowledge that someone tried with due diligence to contact the borrower as required  
 26 under Section 2923.5 and Defendants failed to exercise due diligence in attempting to contact  
 Plaintiffs as required by Section 2923.5, and Plaintiffs were never contacted. Furthermore,

1 neither U.S. Bank nor Wells Fargo was neither the true beneficiary or the servicer due to the lack  
 2 of specificity in bank merger documents and breaches of the DOT, therefore any declaration  
 3 issued pursuant to Section 2923.5 is insufficient.

4

5 **V. Plaintiffs State Facts Sufficient to Constitute a RICO Violation**

6

7 In *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 268 (1992), the Court  
 8 "held that a plaintiff may sue under § 1964(c) . . . if the alleged RICO violation was the  
 9 proximate cause of the plaintiff's injury," Anza, slip op. at 1, which it distilled from § 1964(c)'s  
 10 "by reason of" language, id. at 4. Abjuring a broad statutory interpretation "requir[ing] merely  
 11 that the claimed violation was a 'but for' cause of the plaintiff's injury," the Court read § 1964(c)  
 12 as demanding "some direct relation between the injury asserted and the injurious conduct  
 13 alleged." *Id.* at 4-5 (quoting *Holmes*, 503 U.S. at 265- 268) (emphasis added).

14 Ultimately finding too great an "attenuation" between the claimed RICO § 1962(c)  
 15 violation and injury in Anza, the Supreme Court reversed, explaining that the "proper referent of  
 16 the proximate-cause analysis is an alleged practice of conducting National's business through a  
 17 pattern of defrauding the State." *Id.* at 5-6.3 Stressing the need in a private RICO action to  
 18 connect "plaintiff's harm and the claimed RICO violation," the Court held:

19 To be sure, Ideal asserts it suffered its own harms when the Anzas failed to charge  
 20 customers for the applicable sales tax. The cause of Ideal's asserted harms, however, is a set of  
 21 actions (offering lower prices) entirely distinct from the alleged RICO violation (defrauding the  
 22 state). *Id.* at 6 (emphasis added). Noting that a "RICO plaintiff cannot circumvent the proximate-  
 23 cause requirement simply by claiming that the defendant's aim was to increase market share at a  
 24 competitor's expense," *id.* at 9, the Supreme Court advised bench and bar: When a court  
 25 evaluates a RICO claim for proximate causation, the central question it must ask is whether the  
 26 alleged violation led directly to the plaintiff's injuries. *Anza v. Ideal Steel Supply Corp.*, No. 04-  
 433, 547 U.S. \_\_ (2006).

1        In the instant matter, Plaintiffs audit indicates Defendants causation of the continuing  
 2 harm of slander of title and correlating causes of action stated herein as a result of the fraudulent  
 3 use of robo-signers, breaches of Plaintiffs' Deed of Trust and the PSA for the securitized trust,  
 4 and breaches of California state and federal law. The actions Plaintiffs complain of herein and  
 5 evidenced in Plaintiffs' audit include:

- 6        1)      Wells Fargo's assertion of rights as Servicer without legal authority;
- 7        2)      Failing to evidence chain of title possession and indebtedness;
- 8        3)      Failing to properly substitute foreclosing trustee (Ex. B, p. 12);
- 9        4)      Purporting to transfer beneficial interest without endorsement or assignment.

10        And Plaintiffs have alleged damages resulting therefrom in Plaintiffs' FAC including  
 11 pecuniary damages as a result of Defendants' breaches of Plaintiffs' Deed of Trust and the  
 12 wrongful sale of Plaintiffs' Deed of Trust to the securitized trust because the false recorded  
 13 documents disclose a claim of right, title or interest in the subject property which gives rise to a  
 14 need for policy endorsements for title insurance, settlement of a claim shown on a title report,  
 15 and/or a significant dissuasive factor for any prospective purchaser inspecting the property for  
 16 sale, and/or its disclosures, any and all of which factors negatively affected and continue to affect  
 17 the purchase price and vendibility of the Subject Property in an amount to be proven at trial.  
 18 Therefore, Defendant's demurrer to Plaintiffs' cause of action for violation of 18 U.S.C. § 1962  
 19 should be overruled.

20

21        **VI.        Plaintiffs State Facts Sufficient to Support a Cause of Action for Unfair and  
 22 Deceptive Business Act Practices**

23

24        Defendant also asserts that Plaintiffs' cause of action for unfair and deceptive acts and  
 25 practices ("UDAP"), codified at California Code of Civil Procedure §§ 1750 – 1784 (the  
 26 Consumer Legal Remedies Act) and the Unfair Business Practices Act, Cal. Bus. & Prof. Code  
 §§ 17200 through 17594, must fail because Plaintiffs have not alleged any violations due to

1 Defendant being only a loan servicer. UDAP is a derivative cause of action and Plaintiffs' 2 ability to pursue this cause of action depends on the success or failure of their substantive causes 3 of action. See *Tamburri*, 2011 WL 6294472 at \*18. However, as discussed above, Plaintiffs 4 have alleged sufficient facts to dispute whether JPMorgan acted only as a servicer.

5 Moreover, as discussed herein, Plaintiffs have also alleged sufficient facts to serve as the 6 necessary underlying unfair business practice for their Section 17200 claim.

7 Here, there was never any recording assigning a power of sale to the foreclosing entity on the 8 Notice of Default recorded on December 7, 2012 as Document No. 21990664 in the files of the 9 Santa Clara County Recorder's Office by NDEX.

10 According to this Notice of Default, NDEX purports to act as agent for the Wells Fargo, 11 servicer and/or purporting to be beneficiary.

12 However there is no legal substitution on record in favor of NDEX. Further, there is no other 13 valid, recorded document giving Defendants Wells Fargo and/or U.S. Bank, ownership of the 14 beneficial interest under Plaintiffs' Deed of Trust. In the absence of such a document in the 15 public chain of title, Defendants lack the power of sale. Thus, any attempted sale of Plaintiffs' 16 property on behalf of Defendants Wells Fargo, U.S. Bank or any other purported trustee would be 17 invalid and wrongful.

18 For the reasons stated above, there is a likelihood that Plaintiffs will prevail on the merits of 19 their wrongful foreclosure claim. If Defendants are permitted to rely on void and wrongful 20 Substitution of Trustee, and void NOD and NOTS to complete this foreclosure process by 21 conducting a Trustee's sale and issuing a Trustee's Deed Upon Sale, Plaintiffs will wrongfully 22 lose their home. Such injury is irreparable and cannot be adequately compensated by financial 23 means. Moreover, real property is considered unique in California, and monetary damages are 24 deemed inadequate to compensate Plaintiffs for the loss thereof. *Stockton v. Newman*, 148 Cal. 25 App. 2d 558, 564 (1957).

26 Therefore, the foreclosure is invalid, and Defendant's motion should be denied.

## VII. Conclusion

Plaintiffs respectfully request that the Court overrule WELLS FARGO'S NOTICE OF MOTION AND MOTION TO DISMISS COMPLAINT FOR FAILURE TO STATE A CLAIM and further respectfully requests that if the Court sustains the Motion, then the Court grant Plaintiffs further leave to amend the Complaint.

DATED: April 29, 2013

Respectfully submitted,

/s/ Megan Dailey

Megan Dailey

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NIDA F. CEREZO